

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
EchoStar Satellite Corporation)
Application for Renewal of Special Temporary)
Authority to Operate a Direct Broadcast Satellite)
Over Channels 23 and 24 at the 61.5° W.L. Orbital)
Location)
and)
Rainbow DBS Company LLC)
Application for Special Temporary Authority to)
Operate a Direct Broadcast Satellite Over)
Channels 23 and 24 at the 61.5° W.L. Orbital)
Location)
File No. SAT-STA-20030617-00117
File No. SAT-STA-20030623-00122

ORDER AND AUTHORIZATION

Adopted: October 1, 2003

Released: October 1, 2003

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order we grant Rainbow DBS Company LLC's ("Rainbow") request for special temporary authority ("STA") to operate on the two unassigned channels, 23 and 24, at the 61.5° W.L. orbit location, for a period of 180 days, or until the channels are assigned, whichever occurs first, subject to certain conditions. We also deny EchoStar Satellite Corporation's ("EchoStar") request to renew its STA to continue to operate a satellite over these same two unassigned channels at the 61.5° W.L. orbit location. Granting Rainbow's application will promote efficient use of the direct broadcast satellite ("DBS") spectrum and will facilitate the expansion of service options to consumers by a new entrant on a temporary basis.

II. BACKGROUND

2. There are 32 DBS service channels at the 61.5° W.L. orbit location. Currently, there are two channels at 61.5° W.L., channels 23 and 24, that are not assigned to any DBS licensee. Rainbow

1 R/L DBS Company, LLC, the initial applicant for the STA, recently changed its name to Rainbow DBS Company LLC. See Letter from Benjamin J. Griffin, Counsel for Rainbow DBS Company LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated July 9, 2003). Rainbow DBS is a wholly-owned subsidiary of Cablevision Systems Corporation.

is authorized to operate on 11 odd numbered channels (1-21) at the 61.5° W.L. orbit location.² EchoStar is also authorized to operate and is operating a satellite on 11 even numbered channels (2-22) at 61.5° W.L. Dominion Video Satellite, Inc. (“Dominion”) is authorized to operate on eight channels (25-32) at the 61.5° W.L. orbit location and is currently operating on two of these channels, using one of EchoStar’s satellites under a leasing arrangement. EchoStar is leasing the remaining six channels from Dominion. EchoStar is currently operating over the two unassigned channels pursuant to STA.³

3. On March 21, 1998, EchoStar was granted an STA to operate its EchoStar 3 satellite on the 21 then-unassigned channels at the 61.5° W.L. orbit location.⁴ The grant was subsequently extended twice.⁵ The EchoStar STA at 61.5° W.L. included certain conditions on EchoStar’s operations. Specifically, the conditions were a non-interference obligation, a notification requirement, and an obligation to cease operations upon the sooner of the following conditions: 1) receipt of a license by Dominion or R/L DBS to begin service from the 61.5° W.L. orbit location; or 2) assignment of the two unassigned channels. EchoStar ceased operations on all but the two remaining unassigned channels.⁶

4. In June 2003, EchoStar filed a request to renew its STA⁷ for the two unassigned channels at 61.5° W.L. and Rainbow filed an application for STA to use these same channels.⁸ EchoStar requests authority to continue to operate the EchoStar 3 satellite over channels 23 and 24 at 61.5° W.L. pursuant to its STA for a period of 180 days, subject to the same conditions that were imposed in the grant of the original STA. EchoStar states that it plans to continue to offer its customers non-recurring, event type programming such as pay-per-view. Rainbow requests special temporary

² Rainbow DBS successfully launched its first satellite, Rainbow 1, on July 17, 2003. *See* Letter from Benjamin J. Griffin, Counsel for Rainbow DBS, to Donald Abelson, Chief, International Bureau, Federal Communications Commission (dated July 24, 2003).

³ In March 2003, the Commission issued a Public Notice announcing an auction of four licenses for the unassigned DBS service channels at the orbit locations of 175° W.L., 166° W.L., 157° W.L., and 61.5° W.L. (Auction No. 52). *Public Notice, Auction of Direct Broadcast Satellite Service Licenses Scheduled for August 6, 2003*, Report No. AUC-03-52-A, FCC 03-40 (rel. Mar. 3, 2003) (“*Auction No. 52 Comment Public Notice*”). On June 11, 2003, the Wireless Telecommunications Bureau issued a Public Notice announcing that Auction No. 52 would be delayed pending resolution of certain issues on which the Commission had sought comment. *Public Notice, Auction of Direct Broadcast Satellite Service Licenses (Auction No. 52) Is Postponed*, Report No. AUC-03-52-B, DA 03-1926 (rel. June 11, 2003).

⁴ *In the Matter of Direct Broadcasting Satellite Corporation, Application for Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 1-21 (odd) and 23-32 (odd and even) at 61.5° W.L.*, Memorandum Opinion and Order, 13 FCC Rcd 6392 (1998) (“EchoStar STA Order”).

⁵ *In the Matter of Direct Broadcasting Satellite Corporation, Application for Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 1-21 (odd) and 23-32 (odd and even) at 61.5° W.L.*, Letter from Thomas S. Tycz to David K. Moskowitz, File No. SAT-STA-19980827-00068 (dated September 16, 1998). The Satellite Division verbally renewed the STA on March 16, 1999. Subsequent requests for renewal were filed by EchoStar.

⁶ EchoStar is no longer operating pursuant to STA on the channels assigned to Rainbow and Dominion.

⁷ *In the Matter of EchoStar Satellite Corporation Application for Renewal of Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61° W.L. Orbit Location*, File No. SAT-STA-20030617-00117 (filed June 17, 2003) (“EchoStar STA Renewal”).

⁸ Rainbow DBS Company LLC Application for Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61° W.L. Orbit Location, File No. SAT-STA-20030623-00122 (filed June 23, 2003) (“Rainbow STA Request”).

authority to use the two unassigned channels at the 61.5° W.L. orbit location to provide free standing, separately packaged programming modules that are not required as a condition of purchasing any other programming.⁹ Both applications were placed on Public Notice.¹⁰

III. DISCUSSION

5. The Commission has generally found that requests for STA satisfy the requirements of Section 309(f) of the Communications Act, where grant of such temporary authority would not cause harmful interference to other licensed operations and would serve the public interest, convenience and necessity. Both Rainbow and EchoStar will not cause harmful interference. Both parties have also made compelling cases for use of the two channels. When granting EchoStar's previous request to operate on the unassigned channels at 61.5° W.L., we reviewed the facts presented to us at that time and determined that EchoStar's use of the unoccupied spectrum would offer sufficient public interest benefits under the circumstances of that time to satisfy the requirements of Section 309(f).¹¹ Similarly, we reach our conclusion in this case based upon the facts as they now stand, the showings of the respective parties, the history of the use of these channels, and our evaluation of how the public interest will best be served consistent with statutory requirements.

6. As described more fully below, we find that it is in the public interest to allow Rainbow the opportunity to operate, on a temporary basis, on the two unassigned channels at 61.5° W.L. This will allow Rainbow, a new entrant in the DBS business, the opportunity to use expanded capacity for a limited period of time, in order to help initiate its DBS service. Our decision today is consistent with the Bureau's recognition in other instances of the value of facilitating the ability of new entrants to offer additional services to consumers.¹²

7. EchoStar has benefited from the use of these channels for over five years. There is no renewal expectancy for EchoStar to continue operation on these channels. Indeed, its STA required it to notify customers of the temporary nature of the service and that service could be terminated at any time. In granting the STA, the Bureau noted that EchoStar's temporary use of the unassigned channels at 61.5° W.L. would allow it to provide immediate expanded services to its customers.¹³ Rainbow launched its first DBS satellite in July 2003. We find it appropriate under the current circumstances for Rainbow and its customers to benefit from allowing Rainbow to offer additional services at this time. Moreover, due to the terms of EchoStar's STA, there will be minimal disruption or loss of access to service presently provided by EchoStar to consumers on those channels. These customers have been on notice for more than five years that service was being provided on a temporary basis only.

⁹ Rainbow STA Request and Rainbow Opposition to Petition to Deny at 7.

¹⁰ See Public Notice, Policy Branch Information, Report No. SAT-00155 (July 3, 2003). EchoStar filed a Petition to Deny Rainbow's STA request, Petition to Deny Rainbow STA, (filed August 4, 2003); Rainbow filed a Petition to Deny EchoStar's STA Renewal (filed August 4, 2003). Each party filed Oppositions to the Petition to Deny and a Reply to the Oppositions to Deny.

¹¹ EchoStar STA Order at 6392.

¹² See *In the Matter of Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed-Satellite Service Space Stations in the Ka-Band*, Order, FCC Rcd 14389 (2001) at ¶¶ 5, 18, citing *In the Matter of Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, Memorandum Opinion and Order, 3 FCC Rcd 6972 (1988) at ¶ 3.

¹³ EchoStar STA Order at ¶ 7.

8. While grant of this STA will facilitate the initiation of new services to consumers, we make no finding as to which applicant's technology or service is better, or more suitable for operation at 61.5° W.L. Further, our decision today is without prejudice to Commission consideration of pending issues concerning eligibility for permanent use of the two channels.¹⁴ Rather, our decision here is premised on such factors as the equities and benefits of permitting a new entrant an opportunity to use these channels on a temporary basis, and the importance of ensuring that spectrum can continue to be used to serve the public rather than lying fallow unnecessarily, even on a temporary basis. We disagree with EchoStar's argument relying on *Ashbacker* that a decision regarding temporary use of the channels will prejudge the award of a permanent license.¹⁵ In the *La Star* decision, the Court stated that *Ashbacker* does not preclude the Commission from issuing an interim license, without a hearing on competing applications, if the Commission validly determines that the public interest so requires.¹⁶ The Court stated that the Commission must balance the public interest in the immediate issuance of a license against the potential harm to the fair consideration of competing applications.¹⁷ We have done so in this case before us.

9. Because Rainbow's operation on these channels is temporary, we will require Rainbow to comply with conditions similar to those we imposed on EchoStar in its STA, which were designed to avoid confusion or disruption caused by the termination of service to its customers.¹⁸ Specifically, Rainbow will only be authorized to provide free-standing separate programming packages that are not required as a condition of purchasing any other programming packages and that are readily capable of being withdrawn. Consumers should not have any expectation that the packages that they are purchasing include additional programming provided over channels 23 and 24. Therefore, Rainbow must also provide written notice to its customers that the additional programming is being provided on a temporary basis and will terminate upon expiration of the STA. Although EchoStar asserts that Rainbow's use of the two channels would not be consistent with the conditions that the Commission has imposed on EchoStar's use,¹⁹ we believe our requirement that Rainbow provide only the type of programming that is temporary in nature is consistent with the requirements we placed on EchoStar's temporary use of the two channels.

IV. CONCLUSION AND ORDERING CLAUSES

10. For the foregoing reasons, we find that the public interest, convenience and necessity will be served by allowing Rainbow to operate, on a temporary basis, on channels 23 and 24 at the 61.5° W.L. orbit location.

¹⁴ In the *Auction No. 52 Comment Public Notice*, the Commission sought comment on a number of questions regarding eligibility for the unassigned DBS licenses. *Auction No. 52 Comment Public Notice*, FCC 03-40, at 3-4.

¹⁵ EchoStar Opposition to Petition to Deny at 4.

¹⁶ See, e.g., *La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233, 1235 (D.C. Cir. 1990) citing *Ashbacker Radio Corporation v. Federal Communications Commission*, 66 S. Ct. 148, 151 (1945).

¹⁷ *Id.* citing *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585 589-90 (D.C. Cir. 1968); *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 761-63 (D.C. Cir. 1960).

¹⁸ These conditions required EchoStar to provide only those types of programming that allowed it to "cease operation in short order without disrupting subscribers' services." In addition, EchoStar was required to provide written notice to its customers that the additional programming was being provided on a temporary basis and that it would terminate upon expiration of the STA. EchoStar STA at ¶ 9.

¹⁹ EchoStar Petition to Deny at 5.

11. Accordingly, IT IS ORDERED that Rainbow DBS Company LLC's Application for Special Temporary Authority to operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W.L. orbit location, File No. SAT-STA 20030623-00122, IS GRANTED, for a period of 180 days, or until the channels are assigned, whichever is sooner, subject to the conditions outlined below.

12. IT IS FURTHER ORDERED that EchoStar Satellite Corporation's Application for Renewal of Special Temporary Authority to Operate a Direct Broadcast Satellite Over Channels 23 and 24 at the 61.5° W.L. orbit location, File No. SAT-STA-20030617-00117, IS DENIED.

13. IT IS FURTHER ORDERED that EchoStar Satellite Corporation is required to vacate channels 23 and 24 at the 61.5° W.L. orbit location by October 8, 2003.

14. IT IS FURTHER ORDERED that Rainbow DBS Company LLC shall cease operations on channels 23 and 24 at the 61.5° W.L. orbit location immediately upon the sooner of:

- 1) this special temporary authorization expires; or
- 2) channels 23 and 24 at the 61.5° W.L. orbit location are assigned.

15. IT IS FURTHER ORDERED that this authorization does not confer any permanent authority or right for Rainbow DBS Company LLC to use channels 23 and 24 at the 61.5° W.L. orbit location. This grant is without prejudice to any action the Commission may take with respect to eligibility for a license to use these channels.

16. IT IS FURTHER ORDERED that Rainbow DBS Company LLC's use of channels 23 and 24 at the 61.5° W.L. orbital location shall cause no harmful interference to any other lawfully operating radio station and Rainbow DBS Company LLC shall cease operation on those channels immediately upon notification of such interference.

17. IT IS FURTHER ORDERED that Rainbow DBS Company LLC shall not claim protection from interference from any other lawfully operated radio station with respect to its operations on channels 23 and 24 and that Rainbow DBS Company LLC's operation on channels 23 and 24 is at its own risk.

18. IT IS FURTHER ORDERED that Rainbow DBS Company LLC's temporary use of channels 23 and 24 at the 61.5° W.L. orbit location is for free-standing separate programming packages that are not required as a condition of purchasing any other programming packages and that are readily capable of being withdrawn on short notice. Consumers should not have any expectation that the packages that they are purchasing include additional programming provided over channels 23 and 24. Any failure to comply with this programming requirement will be subject to enforcement action.

19. IT IS FURTHER ORDERED that Rainbow DBS Company LLC must inform its customers, in writing, that services using the two unassigned channels at the 61.5° W.L. orbit location are being provided pursuant to a grant of temporary authority that will expire upon the sooner of April 5, 2004 or until such time as the channels are assigned.

20. IT IS FURTHER ORDERED that Rainbow DBS Company LLC must provide the following language to its customers in its monthly billing statements:

"The [name of module(s)] is only temporarily available. Rainbow DBS's regulatory authority to provide these channels will expire on April 5, 2004. In addition, the Rainbow DBS Company LLC may be required to cease transmitting programming over these channels earlier than that date. Therefore, [name of module] will cease to be available to you

on or before April 5, 2004 without prior notice. If you have any questions, please call us toll-free at [insert telephone number].”

21. IT IS FURTHER ORDERED that Rainbow DBS Company LLC must include in all marketing literature notification that service is being provided on a temporary basis and that service may be diminished or discontinued at any time. Any failure to comply with customer notification procedures herein will be subject to enforcement action.

22. Rainbow DBS LLC is afforded thirty days from the date of release of this SPECIAL TEMPORARY AUTHORITY to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

23. This action is taken pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309, and Section 0.261 of the Commission’s rules, 47 C.F.R. § 0.261 and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief
International Bureau